

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

QUINTON P. BROWN,
Plaintiff,
vs.
ELDON VAIL, et. al.,
Defendants.

NO. CV-08-5091-JPH

ORDER DENYING PLAINTIFF'S
DISCOVERY MOTION
(Ct. Rec. 62)

ORDER DENYING PLAINTIFF'S MOTION
TO APPOINT EXPERT WITNESS
(Ct. Rec. 66)

ORDER DENYING PLAINTIFF'S MOTION
FOR RECONSIDERATION OF ORDER ON
DISMISSAL
(Ct. Rec. 73)

On July 30, 2009, plaintiff filed a motion "to accommodate and facilitate discovery" to inspect and photograph the main kitchen facilities in the east complex of the Washington State Penitentiary. (Ct. Rec. 62). Plaintiff failed to note the motion for hearing, but because counsel for defendants responded in opposition on August 10, 2009 (Ct. Rec. 71), the Court will consider the discovery motion (Ct. Rec. 62) as well as the motion for reconsideration (Ct. Rec. 73) with plaintiff's motion to appoint an expert (Ct. Rec. 66), noted for hearing without argument on August 24, 2009 (Ct. Rec. 67). Defendants

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1 responded in opposition to the motion to appoint an expert on August
2 14, 2009 (Ct. Rec. 72). The parties have consented to the
3 jurisdiction of the Magistrate Judge in this case. (Ct. Rec. 58.)

4 BACKGROUND

5 On May 1, 2009, defendants filed a motion to dismiss defendants
6 Eldon Vail, Greg Garringer, Jeff Uttecht, and Gary Friedman and a
7 12(b)(6) motion to dismiss the § 1983 claims relating to the First,
8 Eighth and Fourteenth Amendments. (Ct. Rec. 47.) In his June 5, 2009,
9 reply memorandum, Mr. Brown moved to dismiss his Eighth Amendment
10 claim without prejudice. (Ct. Rec. 55 at 49.) On July 28, 2009, the
11 Court granted in part and denied in part the defendants' motion. (Ct.
12 Rec. 61.) The Court did not address defendants' motion to dismiss the
13 Eighth Amendment claim as it had become moot as a result of
14 plaintiff's motion to dismiss. (Ct. Rec. 61 at 4, fn 4.)

15 The court dismissed Mr. Brown's First Amendment claim (that he
16 was deprived of his right to petition the government for redress)
17 pursuant to Fed. R. Civ. Pro. 12(b)(6) because he failed to state a
18 claim for which relief could be granted. (Ct. Rec. 61 at 7-8.) The
19 court dismissed under 12(b)(6) Mr. Brown's § 1983 claim with respect
20 to the prison grievance system because he failed to show he was
21 retaliated against for filing grievances, as is required to establish
22 such a claim.

23 The court dismissed defendant Young without prejudice because the
24 only facts pled by plaintiff relating to Young were facts in support
25 of his First and Eighth Amendment claims. (Ct. Rec. 61 at 9.)
26

1 With respect to Mr. Brown's claim pursuant to the Fourteenth
2 Amendment, that he was deprived of his right to equal protection, the
3 court dismissed under 12(b)(b)(6) finding Mr. Brown's equal protection
4 claim fails because he does not allege discriminatory intent. (Ct.
5 Rec. 61 at 11.) The Court further found that the facts pled by Mr.
6 Brown tend to show, at most, that defendants acted knowingly or with
7 deliberate indifference, not with discriminatory intent. The court
8 dismissed the above claims without leave to amend.

9 The court dismissed defendant Friedman without leave to amend
10 because he is not a state actor and could not therefore have acted
11 under color of state law as required for a § 1983 claim. (Ct. Rec. 61
12 at 11-14.) The court dismissed without leave to amend the
13 § 1985(3) claims because no set of facts can support a claim of
14 conspiracy to violate Mr. Brown's constitutional rights. (Ct. Rec. 14-
15 15.)

16 The court found Mr. Brown's RLUIPA claim remains, but with
17 respect to state officials, he is limited to injunctive relief. (Ct.
18 Rec. 15-17.) In their individual capacities, the state officials have
19 qualified immunity from RLUIPA. (Ct. Rec. 61 at 17.)

20 In sum, Mr. Brown proceeds on the RLUIPA claim which involves
21 allegations that he has not been served kosher food at the WSP. If he
22 prevails, Mr. Brown will be eligible for injunctive relief, not
23 monetary damages, from the remaining defendants in their official
24 capacity. (Ct. Rec. 61 at 19.)

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DISCOVERY STANDARDS

The purpose of discovery is to make trial "less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible," *United States v. Procter & Gamble*, 356 U.S. 677, 683 (1958), and to narrow and clarify the issues in dispute, *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

Fed. R. Civ. P. 26(b) establishes the scope of discovery and states in pertinent part:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

"The party who resists discovery has the burden to show that discovery should not be allowed, and has the burden of clarifying, explaining, and supporting its objections." *Oakes v. Halvorsen Marine Ltd.*, 179 F.R.D 281, 283 (C.D. Cal. 1998); *Nestle Foods Corp. v. Aetna Casualty & Surety Co.*, 135 F.R.D. 101, 104 (D. N.J. 1990).

Fed. R. Civ. P. 34(b) requires a document request to "set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity." A party is obliged to produce all specified relevant and nonprivileged documents or other things which are in its "possession, custody or control" on the date

1 specified in the request. Fed. R. Civ. P. 34(a); *Norman Rockwell*
2 *Int'l Corp. v. H. Wolfe Iron & Metal Co.*, 576 F.Supp. 511, 512 (W.D.
3 Pa. 1983).

4 DISCUSSION

5 Plaintiff's motion for an order to accommodate and facilitate
6 discovery requests that defendants provide access to the Washington
7 State Penitentiary (WSP) main kitchen facility located in the east
8 complex during normal day-time operations for the purpose of taking
9 photos. (Ct. Rec. 62 at 1.) Defendants provided plaintiff with a
10 written response and objections to his request on or about August 10,
11 2009. (Ct. Rec. 71.) The court finds that defendants are correct to
12 object to the discovery requested by plaintiff.

13 Request to photograph main kitchen

14 Plaintiff requested "access to the east complex kitchen" to
15 obtain photo exhibits of the kitchen facilities. (Ct. Rec. 62 at 1-
16 3.) Plaintiff asserts the "exhibits are necessary to corroborate
17 Plaintiff's allegations." (Ct. Rec. 62 at 3.)

18 Defendants object for several reasons: (1) plaintiff is currently
19 in protective custody in a mental health unit. Defendants state that
20 moving plaintiff from his housing in the West Complex requires a
21 personal escort by one staff member, and only at a time when no other
22 offenders are moving on the grounds of plaintiff's route to the main
23 kitchen. (Ct. Rec. 71 at 2; Exhibit 1 at 2.)

24 (2) Because he is in protective custody, plaintiff cannot enter
25 the kitchen when any other offenders are present. (Id.) This means
26

1 kitchen offender staff members would have to be evacuated resulting in
2 the halt of food preparation, which involves preparing three daily
3 meals for 1100-1200 offenders. (Ct. Rec. 71 at 2-3; Exhibit 1 at 2.)

4 (3) Plaintiff, as well as all other inmates, is prohibited from
5 possessing a camera and from taking pictures on prison grounds. (Ct.
6 Rec. 71 at 3.)

7 Defendants further assert plaintiff has not articulated why he
8 seeks to discover information about the kitchen, what relevance photos
9 of the kitchen will have to his claim, and why he cannot gather the
10 discovery he seeks through other processes provided for under the
11 civil rules. (Ct. Rec. 71 at 3.)

12 The Court has weighed plaintiff's request to compel defendants to
13 facilitate discovery by granting him access to the main kitchen in the
14 east complex for purposes of taking photos of the kitchen facilities.
15 The Court finds plaintiff has failed to show good cause for ordering
16 discovery because he fails to show that the evidence sought is
17 relevant to the subject matter. Accordingly, the motion is denied
18 without prejudice.

19 **Motion to appoint expert**

20 Plaintiff moved for the appointment of an expert witness. (Ct.
21 Rec. 66.) Defendants respond that an expert's testimony with respect
22 to kosher diets is unnecessary, as evidenced by courts making these
23 types of determinations without expert testimony in the past. (Ct.
24 Rec. 72 at 3, citing e.g., *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th
25 Cir. 1997); *Kahane v. Carlson*, 527 F.2d 492 (2nd Cir. 1975.)

1 The Court again finds plaintiff to fails to show the need for an
2 expert witness with respect to the narrowed issues currently pending.
3 Because plaintiff fails to show that an expert is needed at trial in
4 order for the jury to understand the relatively straightforward issues
5 presented, the motion to appoint an expert is denied. See Fed. R.
6 Evid. 706.

7 **Motion to reconsider order granting/denying motion to dismiss**

8 Plaintiff moved for reconsideration (Ct. Rec. 73) of the court's
9 order on defendants' motion for dismissal. (Ct. Rec. 61.) Although
10 defendants have not yet responded to plaintiff's reconsideration
11 motion, the Court finds an answer is unnecessary. After reconsidering
12 the reasoning articulated in the Court's prior order, the Court finds
13 no reason to change its prior determinations. Accordingly, plaintiff's
14 motion for reconsideration (**Ct. Rec. 73**) of the Court's order granting
15 in part and denying in part defendants' motion to dismiss (Ct. Rec.
16 61) **is denied**. The hearing noted September 14, 2009 (**Ct. Rec. 75**) is
17 **stricken as moot**.

18 **CONCLUSION**

19 After reviewing plaintiff's motions for discovery, appointment of
20 expert witness, and reconsideration of the Court's order granting in
21 part and denying in part defendants' motion to dismiss, **IT IS ORDERED**
22 plaintiff's motion for discovery (**Ct. Rec. 62**) is **DENIED** without
23 prejudice.

24 **IT IS FURTHER ORDERED** plaintiff's motion to appoint an expert
25 witness (**Ct. Rec. 66**) is **DENIED**.

26
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IT IS FURTHER ORDERED plaintiff's motion for reconsideration (Ct. Rec. 73) of the Court's Order entered July 28, 2009, granting in part and denying in part defendants' motion to dismiss is **DENIED**.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and forward a copy to plaintiff and counsel for defendants.

DATED this 24th day of August, 2009.

S/James P. Hutton

JAMES P. HUTTON

UNITED STATES MAGISTRATE JUDGE